

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

WARREN S.

Claimant

OAH No. N 2007010473

vs.

SAN ANDREAS REGIONAL CENTER

Service Agency.

DECISION

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings, heard this matter on March 27, 2007, in Campbell, California.

Nancy J. Johnson, Attorney at Law, 10 Almaden Boulevard, 11th Floor, San Jose, California 95113-2233, represented the San Andreas Regional Center (SARC).

Claimant was represented by his mother Anna S. and father Troy S.

The matter was submitted on March 27, 2007.

ISSUE

Whether claimant is eligible for services under the Lanterman Act due to autism.

FACTUAL FINDINGS

1. Claimant is a 6-year-old boy born May 14, 2001. He suffers from severe speech and language delays. Claimant primarily communicates by pointing, shaking his head and leading by the hand. Claimant tantrums frequently in the home environment and can be aggressive when upset. He is performing below grade level and receives special education services at school.

2. Claimant was referred by his parents for determination of eligibility under the condition of autism following evaluations which suggested he might suffer from an autistic disorder.

3. On May 5, 2006, claimant was assessed by Richard B. Coolman, M.D., and Angie Marshall, M.S., CC-SLP (collectively Coolman), at the Center for Learning and Achievement in San Jose, California. Claimant was four years and eleven months of age. Coolman's report indicates that claimant was referred to the Center due to concerns about claimant's speech/language delay and severe tantrums. Coolman made the following pertinent findings:

1. Autistic Disorder with impairments on ADOS [Autism Diagnostic Schedule] in communication, social-interaction and restricted interests; M-CHAT [Modified Checklist for Autism in Toddlers] showed 3 fails, none critical; CBCL [Childhood Behavior Checklist] clinically significant in somatic complaints, aggressive behavior, anxiety, pervasive developmental and oppositional defiant problems; using mostly single words, showed few attempts to direct examiner's attention, response to social interaction restricted, and non-reciprocal, mostly in response to questions; did not involve examiner in his play, licked toy people, was repetitive in play, did imitate gross motor activities such as toe walking and heel walking; parents particularly concerned about his difficulty letting go, tantrumming up to 30-45 minutes twice a week when he wants something immediately sometimes related to rigidity or restricted interests; unclear whether he's receiving any autism support in special education special day class.

2. Strengths: good sustained eye contact, will point, responds to name, reportedly knows routes to favorite restaurants and has good academic skills. . . .

Coolman made various recommendations, including "continue education supports with attention to [claimant's] autism issues, including behavior plan as appropriate."

4. Claimant was assessed in January 2006 by L. Josephine Cheung, L.C.S.W., who was seeing claimant's parents for issues of domestic violence. Cheung diagnosed ADHD, PTSD and Adjustment Disorder, with a rule out of autism. In her initial assessment report Cheung notes the following:

Mental Status: Child was active, showed no eye contacts, remarkable speech problems-inaudible, screams a lot to get his needs met, doesn't respond to instructions, licks anything he wants to, would barge into any space-office or personal.

Violence Risk/History: Hits parents and brother when he is irritated.

Formulation of Problem: Child shows signs of autism – speech, peculiar behaviors, etc.

Disposition: Weekly individual talk & play therapy and family therapy. Refer to SARC for special services. Contact [school] to provide special [education] to student.

5. Cheung saw claimant on at least five occasions after her initial assessment. By the fourth meeting Cheung noted that there was no sign of ADD and claimant was compliant with instructions. Cheung's notes for the fifth meeting state:

4/24 [Claimant] did not listen to his mother who called me for help to get him out of the [vehicle]. I asked him to come out and he complied without [difficulty]. He held my hand and walked into my office as a normal child. He was excited to be in play therapy. He remembered what he wanted to play. He chose the train set. He was attentive to his play with pleasant mood. He was eager to learn and he asked for help after my coaching. He repeated the [vocabulary] after me with good eye contact. There was no sign of add [sic]. He complied to instructions very well at ending of session.

6. In February 2006, the Sunnyvale School District conducted an integrated assessment of claimant in order to reinstate his Individualized Education Plan (IEP) following claimant's transfer from the Tracy Unified School District. Claimant was four years and eight months of age. The school psychologist, special education teacher and school speech therapist participated in the assessment. Sunnyvale administered the Childhood Autism Rating Scale (CARS) since it had previously been administered to claimant by the Tracy Unified School District. Claimant's score was in the non-autistic range, with normal or mildly abnormal scores in each category except verbal communication, which was in the moderately abnormal range due to speech delays. Documentation from the Sunnyvale Unified School District indicated that claimant responded well to redirection and complied easily. He smiled in response to his name and greeted adults and peers appropriately. Sunnyvale found that claimant did not qualify for special education services under the category of autism, but that he did qualify for such services under the category of speech and language impaired.

7. Claimant had been previously evaluated by the Tracy Unified School District preschool assessment team in October 2004. His cognitive ability was found to be in the very low range based on testing using the Differential Abilities Scales (DAS), but the team felt the results should be viewed with caution. The team administered CARS since claimant exhibited behaviors symptomatic of an autism spectrum disorder. Claimant tested in the severely autistic

range, with behaviors that included delays in language development, aloofness in social interaction, difficulty with imitation, atypical response to sound, difficulty with transitions and avoidance of eye contact. Claimant's adaptive levels, which were measured using the Vineland Adaptive Behavior Scale, were very low. Although respondent exhibited autistic characteristics during testing by the Tracy Unified School District, claimant's IEP indicates claimant was placed in special day classes in Tracy under the category of speech and language impairment, not autism.

8. Claimant's parents assert that Coolman's diagnosis of Autistic Disorder, and the assessments of Cheung, Sunnyvale School District and Tracy Unified School District, all demonstrate that respondent suffers from developmental impairment and collectively support a diagnosis of autism.

9. Claimant was evaluated by SARC psychologist Jary Larsen, Ph.D., during an intake assessment on June 9, 2006. Larsen testified that claimant made good eye contact when he arrived, responded to his name and answered questions directed toward him. He was compliant with all directions given. During the assessment claimant was quick to show the toys he was playing with to his parents and Larsen. Larsen did not note any rigidity or repetitive behavior. Claimant did not tantrum or lick toys. He was interested in what his brother, who was also present at the assessment, was doing and tried to engage him. Larsen's impression from the assessment was that claimant was quite social, had emerging social skills, and made appropriate attempts to communicate given his limited speech and language.

10. Intake Service Coordinator Janet Juarez was also present on June 9, 2006. Juarez observed that claimant came in readily and began playing with toys. He interacted and played well with his older brother during the assessment. There was no fighting or misconduct and there were no repetitive behaviors or repetitive verbal communications. When claimant's name was called he turned around, smiled and made good eye contact with the person calling his name. Claimant went to his father readily when his father called him, and claimant permitted his father to wipe his runny nose with the father's bare hand. Claimant's mother also reported that claimant always wanted his mommy, which Juarez considered indicative of affection.

11. After the assessment Larsen sought additional information from two of claimant's teachers. When he spoke with claimant's teacher in the Sunnyvale School District, she stated that claimant had significant speech and language deficits, but was very social. She felt claimant's inappropriate behaviors were his biggest problem. The teacher also advised Larsen that claimant had been placed in foster care. She told Larsen that once claimant was removed to foster care, many of his inappropriate behaviors subsided and she saw a significant improvement in behavior in a very short time period. The teacher further advised Larsen that claimant was no longer in the Sunnyvale School District, but had been transferred to the Milpitas School District by his foster parents. Larsen then spoke with claimant's teacher in Milpitas. She told him that claimant had transitioned from Sunnyvale to Milpitas quite well and that she had not seen any type of inappropriate behavior (i.e., tantrumming, acting out or aggression) in the classroom. She also noted that claimant made great eye contact and interacted well with other students. The teacher considered respondent strictly a speech and

language special education student. She described claimant as an “extremely affectionate child” and stated that he was doing well in school.

12. Cheryl Burks became claimant’s social worker in August 2006, following claimant’s removal from the family home. When Burks reviewed claimant’s file it indicated that he had behavioral problems, including tantrums, failure to follow instructions and out of control behaviors, that were displayed both at school and at home. Burks has not observed such behaviors since taking over claimant’s case. Burks describes claimant as a “hugger” (he gives her a big hug whenever she visits), who is very gentle, sweet and well behaved. Claimant makes good eye contact when she visits and he likes to show her his homework from school and his favorite toys. Claimant also interacts well with his foster mother and gets along well with his brother, who has been placed with the same foster family. Recent school reports received by Burks indicate claimant is getting along well with his peers and there have not been any reports of behavior problems. Claimant is also progressing academically.

13. Following his evaluation of claimant, review of documentation from Tracy Unified School District and Sunnyvale Unified School District and receipt of input from claimant’s teachers and Burks, claimant’s social worker, Larsen concluded that claimant did not have an autistic disorder. Larsen relied upon the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders-4th edition Text Revision published by the American Psychiatric Association (the DSM-IV-TR) in reaching his conclusion. Under the DSM-IV-TR criteria, markedly abnormal or impaired social interaction and communication, and markedly restrictive, repetitive and stereotyped patterns of behavior, interests and activities are required for a diagnosis of autism.¹ Larsen did not find marked impairment in any of the required areas.

¹ The DSM-IV-TR diagnostic criteria for Autistic Disorder are:

- A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):
- (1) qualitative impairment in social interaction, as manifested by at least two of the following:
 - (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to eye gaze, facial expression, body postures, and gestures to regulate social interaction
 - (b) failure to develop peer relationships appropriate to developmental level
 - (c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)
 - (d) lack of social or emotional reciprocity
 - (2) qualitative impairments in communication as manifested by at least one of the following:
 - (a) delay in or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gestures or mime)
 - (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain conversation with others
 - (c) stereotyped and repetitive use of language or idiosyncratic language
 - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level

At hearing Larsen provided an in-depth explanation of his conclusion. With respect to impairment in social interaction, Larsen explained that children with autism typically do not respond to their name or make good eye contact. Claimant made good eye contact when he arrived and responded to his name. Autistic children rarely want to share or engage in social interaction with others, instead preferring to be alone. During the assessment claimant was quick to show the toys he was playing with to his parents and Larsen. An autistic child usually will not reach out to another child. Claimant was very interested in what his brother was doing and tried to engage him. Claimant's parents and teachers also reported that his social interactions at school were quite good. Autistic children typically have to be prompted several times before they will come to the person who is calling them or comply with directions. Claimant was compliant with directions. Children who are autistic usually are not affectionate and do not seek the comfort of parents. They will seek out another person if they want something (e.g., a cookie) but not for any type of emotional feedback. Claimant's parents reported that claimant always wanted his mother.

Larsen also felt the teachers' descriptions of claimant supported his conclusion that claimant did not suffer from marked social impairment. The teachers reported that claimant transitioned well from Sunnyvale to Milpitas. Autistic children do not handle change well, and changes typically result in increased autistic behavior. The Milpitas school teacher described claimant as an affectionate child and Burks described him as a hugger. An autistic child is generally extremely aloof and unaffectionate.

Larsen concluded claimant did not have a qualitative impairment in communication because he appropriately used his behaviors to communicate his wants, there was no evidence of stereotyped, repetitive or idiosyncratic language, and claimant's play and interaction with his brother was appropriate for his developmental level.

Larsen also determined there was a lack of evidence of restricted repetitive and stereotyped patterns of behavior. No such behavior was observed by Larsen or reported by teachers, family members or claimant's social worker. Although licking of toys by claimant had been reported, Larsen did not observe this behavior during his assessment. In addition,

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- (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
 - (a) encompassing preoccupation with one or more stereotyped and restricted patterns or interest that is abnormal either in intensity or focus
 - (b) apparently inflexible adherence to specific nonfunctional routines or rituals
 - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
 - (d) persistent preoccupation with parts of objects
 - B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.
 - C. The disturbance is not better accounted for by Rhett's Disorder or Childhood Disintegrative Disorder.

there was some indication in the documentation that claimant used the behavior to get attention, and the documentation indicated that claimant was easily redirected, which suggested to Larsen that it was not a repetitive or stereotyped behavior.

14. Larsen disagreed with Coolman's diagnosis of autistic disorder. He noted that Coolman did not cite any of the diagnostic criteria for an autistic disorder set forth in the DSM-IV-TR in his report. Coolman instead relied on ADOS, which is a tool used to diagnose individuals who might be on the autistic spectrum, but failed to include any behavioral observations to indicate how claimant reacted to the assessment and failed to include any of claimant's scores (the higher the score the more impaired the individual). M-CHAT, also relied on by Coolman, is a checklist of 23 items. However, only six of those items are considered critical to a determination of autism. Coolman's report stated that respondent did not fail any of the critical items. Larsen also noted that certain items noted by Coolman (i.e., good sustained eye contact, responds to name and will point) were inconsistent with a diagnosis of autism under the DSM-IV-TR. Larsen also felt Coolman failed to account for certain key items in his report: home environment and claimant's hearing. Larsen noted that at the time of Coolman's assessment the home environment was in turmoil and included domestic violence, divorce proceedings and possible Child Protective Services involvement. There was also a history of alcohol and substance abuse by the father. Larsen feels claimant's home environment could have affected his functioning.² Larsen also noted that there was some evidence that claimant had suffered a loss of hearing in at least one ear, which was corrected by surgery in early 2005. Larsen felt claimant's hearing could have affected his functioning.

With respect to Cheung's "rule out autism" diagnosis, Larsen notes that although claimant exhibited autistic behaviors when initially assessed by Cheung, by the fifth visit approximately ten weeks later, the autistic behavior had dissipated. Larsen explained that such behaviors would not dissipate if claimant were indeed autistic. With respect to the autistic-like behaviors exhibited by claimant while he was attending school in Tracy, Larsen similarly noted that these behaviors virtually disappeared following a change in home environment. Larsen's explanation of why claimant did not qualify for services under the Lanterman Act under the category of autism was persuasive.

LEGAL CONCLUSIONS

1. Under the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.), the State of California accepts responsibility for persons with developmental disabilities. (Welf. & Inst. Code, § 4501.) A developmental disability is defined as a disability that is attributable to

² Larsen noted that the fact that there was a significant improvement in behavior after claimant was removed from the family home suggested that some of claimant's autistic-like behaviors may have been a reaction to his environment. Claimant's parents acknowledge that in the past there have been domestic violence and alcohol and substance abuse issues in the home. However, they assert that these elements have not been present in the home since June 2005, and therefore they do not feel they necessarily affect claimant's functioning.

mental retardation, cerebral palsy, epilepsy, autism or other conditions similar to mental retardation that require treatment similar to that required by mentally retarded individuals. (Cal. Code. Regs., tit. 17, § 54000, subd. (a).)³ The disability must begin before the age of eighteen, be likely to continue indefinitely, and constitute a substantial handicap for the individual. (§ 54000, subd. (b)(1); Welf. & Inst. Code, § 4512, subd. (a).) A condition constitutes a substantial handicap if it results in major impairment of cognitive and/or social functioning,⁴ and represents a condition of sufficient impairment to require interdisciplinary planning and coordination of special or generic services. (§ 54000, subd. (a).)

2. Although claimant has delays in speech and language, he does not meet the diagnostic criteria for an autistic disorder. The essential features of an autistic disorder are the presence of markedly abnormal or impaired development in social interaction and communication, and restrictive, repetitive and stereotyped patterns of behavior, interests and activities. Claimant is social, communicates appropriately with peers and adults, and does not exhibit a markedly restricted repertoire of activity and interests. Claimant's condition does not qualify him for services under the Lanterman Act under the category of autism.

ORDER

Claimant's appeal from SARC's denial of eligibility for services is denied. Claimant is not eligible for services under the Lanterman Act.

DATED: _____

CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is a final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.

³ All citations are to the California Code of Regulations, title 17, unless otherwise indicated.

⁴ Pursuant to section 54001, subdivision (b), the existence of a major impairment is determined through an assessment which addresses aspects of functioning, including but not limited to:

- (1) Communication skills;
- (2) Learning;
- (3) Self-care;
- (4) Mobility;
- (5) Self-direction
- (6) Capacity for independent living
- (7) Economic self-sufficiency.